

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1298-CR

STATE OF WISCONSIN

Cir. Ct. Nos. 2911TR4346
2011TR4347

**IN COURT OF APPEALS
DISTRICT II**

CITY OF SHEBOYGAN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY M. HALIDA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ Jeffrey Halida appeals convictions for driving while intoxicated and driving with a prohibited blood alcohol concentration.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Halida contends that testimony regarding his use of prescription narcotics unfairly prejudiced him at trial. We affirm.

Facts

¶2 At approximately 1:50 am on October 9, 2011, Officer Andrew Kunding was dispatched to the scene of a single vehicle accident in the city and county of Sheboygan. Upon arriving at the scene, Kunding observed a motorcycle resting in the median of the road and the driver laying on the ground, apparently having collided with a light pole nearby. Kunding approached the scene and noticed the driver was bleeding from the head. Kunding advised the driver to remain still until an ambulance arrived. The driver identified himself as Jeffrey Halida.

¶3 At the scene, Kunding recognized the odor of alcohol on Halida. Halida also admitted he had probably had too much to drink before being transported from the crash by ambulance. At the hospital, Kunding again noticed a strong odor of alcohol on Halida. He also observed Halida's eyes to be very bloodshot and glassy, which he believed to be indicative of intoxication. After Halida's CAT scan was completed, Kunding informed Halida that he was under arrest and asked if he would submit to a voluntary blood draw to test for alcohol. Halida agreed and stated that he "had really screwed up this time" and that he "was going to lose everything." Kunding testified that he had not performed a field sobriety test at the scene of the accident because he was concerned that Halida may have suffered a head injury.

¶4 After the blood sample was taken, Kunding read Halida his *Miranda*² warnings, and proceeded to ask about his activities prior to the accident. Halida said he had been bar-hopping with friends from 1:00 p.m. until 1:25 a.m., i.e., for more than twelve hours and up until about a half hour before the accident. Pursuant to the Department of Transportation’s Alcohol Influence Report, Kunding also asked Halida about his medical history, including if he was diabetic and if he was on any medication. Halida responded that he had a prescription for Oxycodone and had taken two pills earlier that day. Halida was released from the hospital later that night. The blood test later revealed Halida’s blood alcohol level to be .178.

¶5 The morning of trial, Halida moved to preclude any mention of the Oxycodone during the trial. He argued that mentioning that he had taken Oxycodone would prejudice the jury to speculate that he was under the influence of the drug at the time of the accident. The prosecutor stated that he did not intend to go into detail with regard to the Oxycodone but that it was no different than the other medical testimony and evidence in this case. The trial court ruled that the Oxycodone evidence was not prejudicial because it was “part of the story.”

¶6 During direct examination, Kunding indicated he had asked Halida routine medical questions. As part of a standard questionnaire, Kunding asked Halida if he was on any medication. Halida responded that he had taken two Oxycodone pills earlier that day for a hand injury. This statement was the only mention of the Oxycodone at any time during the trial, from opening statements until closing arguments.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶7 The six-person jury found Halida guilty of both operating a vehicle while intoxicated (OWI) and operating a vehicle with a prohibited alcohol content (PAC). Halida appeals both convictions.

Standard of Review

¶8 It is within the discretion of the trial court to exclude relevant evidence where its probative value is outweighed by the danger of unfair prejudice. *Miller v. State*, 53 Wis. 2d 358, 368, 192 N.W.2d 921 (1972). A trial court's determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous exercise of discretion. *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992).

Analysis

¶9 Halida argues that Kundinger's testimony regarding his use of Oxycodone unfairly prejudiced him because it could have "lure[d] the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 172 (1997). However, looking at the totality of the circumstances, it is difficult to imagine how any reasonable juror could have found Halida not guilty of driving while under the influence of alcohol, whether or not the Oxycodone was mentioned. In view of the record, the mention of Oxycodone was superfluous and immaterial, even though unnecessary to the State's prosecution of the case.

¶10 The testimony regarding the Oxycodone was very brief and neither Kundinger nor the State even speculated that it may have impacted Halida's ability to drive. Even if the jury did consider the Oxycodone, the blood alcohol test was overwhelming proof that Halida was driving far above the legal limit of .08.

Additionally, Kundinger testified that Halida smelled of alcohol and had bloodshot eyes. Halida himself admitted that he had been drinking for almost twelve hours until shortly before the accident. Any reasonable juror would have found all this evidence to be sufficient to convict Halida without any mention of Oxycodone.

¶11 Furthermore Halida was clearly charged with driving under the influence of alcohol, not the prescription medication. The jury instructions defined “Under the Influence of an Intoxicant” in terms of consumption of an alcoholic beverage. Nowhere in the charge or the jury instructions for this charge did “Operating Under the Influence” reference the influence of any other substance, besides alcohol. Additionally, count two was specifically titled “Operating With a Prohibited Alcohol Concentration,” and the instructions clearly indicated an element of the offense to be the measurement of .08 grams or more of alcohol in 100 milliliters of the person’s blood. Thus, the instructions and the charges themselves unmistakably communicated to the jury that Halida’s guilt depended on the evidence of his alcohol consumption. There is no basis to believe that the jury factored in the Oxycodone when weighing Halida’s guilt.

¶12 Lastly, we note that the burden of proof in an action for forfeiture is reasonable certainty, not beyond a reasonable doubt as in a criminal trial. Only five out of the six jurors needed to agree to convict or acquit in this case, and none dissented on either charge. The jury’s decision was unsurprising given that there was no basis in the evidence for any other determination.

¶13 Looking at the totality of the evidence in this case, the State’s mention of Oxycodone did not unfairly prejudice Halida.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)4.

